COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

HAMPDEN, ss.

U.S. BANK NATIONAL ASSOCIATION, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z, Plaintiff, v. ANTONIO IBANEZ, Defendant.	)	08 MISC 384283 (KCL)
WELLS FARGO BANK, N.A., as trustee for ABFC 2005-OPT1 Trust, ABFC Asset Backed Certificates Series 2005-OPT1, Plaintiff, v. MARK A. LARACE and TAMMY L. LARACE, Defendants.	)	08 MISC 386755 (KCL)

MEMORANDUM AND ORDER ON THE PLAINTIFFS' MOTIONS TO VACATE JUDGMENT[1]

Introduction

Each of the above-captioned cases,[2] along with a third that was previously coordinated

[1] I wish to thank the parties and *amici* who made submissions in connection with these motions. Briefs for the parties were submitted by Walter Porr, Jr. of Ablitt Law Offices, P.C. (for the plaintiffs/moving parties in both cases); Paul Collier III, Max Weinstein of the Wilmer/Hale Legal Services Center of Harvard Law School, and Eloise Lawrence and David Dineen of Greater Boston Legal Services (for defendant Antonio Ibanez); and Glenn Russell, Jr. (for defendants Mark and Tammy Larace). *Amici* briefs were submitted by Reneau Longoria of Doonan Graves & Longoria LLC; Marie McDonnell of Truth in Lending Audit & Recovery Services LLC; Edward Rainen, Ward Graham, Martin Haller and Robert Moriarity, Jr. for the Real Estate Bar Association for Massachusetts; Kevin Costello, Gary Klein and Shennan Kavanaugh of Roddy Klein & Ryan; and Robert Hobbs of the National Consumer Law Center.

[2] *U.S. Bank National Association, as trustee for the Structured Asset Securities Corporation Mortgage Pass-*

with them but is not currently in issue,[3] involved a mortgage foreclosure sale of a residential property in Springfield that was noticed and conducted by an entity without any record interest in that mortgage at the time of notice and sale. In each case, notice was published in the *Boston Globe* rather than a Springfield-based newspaper. In each case, the plaintiff was both the foreclosing party and the only bidder at the sale. In each case, the plaintiff purchased the property at a substantial discount from its appraised value, wiping out all of the defendants' equity in the properties and leaving one of them with a substantial loan deficiency that would not have been owed had the property sold for its appraised value. In each case, the plaintiff could not obtain insurance for the title it purportedly received from that sale. The plaintiffs thus brought these actions to "remove a cloud from the title" of the properties in question. G.L. c. 240, § 6.

The relief requested to remove that cloud was the same in each case[4] — "that the Court adjudge and decree:

- [T]hat [Ibanez's and Larace's] right, title and interest in the Property was extinguished by the Judgment on the Complaint to Foreclose Mortgage [the judgment in the Servicemembers case[5]] and the execution of the Power of Sale contained in the mortgage by [U.S. Bank (in *Ibanez*) and Wells Fargo (in *Larace*)].

- That there is no cloud on title to the foreclosed property due to the fact that Notice of Sale was published in the Boston Globe.

- That title is vested in [U.S. Bank (in *Ibanez*) and Wells Fargo (in *Larace*)] in fee simple.

Through Certificates, Series 2006-Z v. Antonio Ibanez, Misc. Case No. 08-384283 (KCL) (hereafter "*Ibanez*"); and *Wells Fargo Bank, N.A., as trustee for ABFC 2005-OPT1 Trust, ABFC Asset Backed Certificates Series 2005-OPT1 v. Mark Larace and Tammy Larace*, Misc. Case No. 08-386755 (KCL) (hereafter "*Larace*").

[3] *LaSalle Bank National Association, as trustee for the certificate holders of Bear Stearns Asset Backed Securities I, LLC Asset-Backed Certificates Series 2007-HE2 v. Freddy Rosario*, Misc. Case No. 08-386018 (KCL) (hereafter "*Rosario*"). The lawyers for the plaintiffs were the same in each of the three cases and their motions for entry of default judgment were scheduled and heard together. Neither the plaintiff nor the defendant in *Rosario* has challenged or appealed the final judgment in that case.

[4] The only difference was the name of the plaintiff and the name of the defendant(s).

[5] The Servicemembers Judgments so referenced only adjudicated that the defendant/equity holders were not entitled to the benefits of the Servicemembers' Civil Relief Act. *Beaton v. Land Court*, 367 Mass. 385 (1975). No other aspect of the foreclosures was addressed in those proceedings. *Id.*

- For such other and further relief as the Court deems just and appropriate."

Ibanez, Complaint at 3-4, ¶¶ 1-4 (Sept. 12, 2008); *Larace*, Complaint at 3-4, ¶¶ 1-4 (Oct. 23, 2008); *Rosario*, Complaint at 3-4, ¶ 1-4 (Oct. 17, 2008). None of the complaints was ever amended, none of their allegations was ever changed or modified, and none of the four requests for relief was ever modified or withdrawn.

Ibanez and *Larace* each presented the same two substantive issues for resolution, both arising under G.L. c. 244, § 14 (foreclosure under power of sale; procedure; notice; form): (1) was the *Boston Globe*, the newspaper in which the notices of foreclosure sale were published, a "newspaper with general circulation in the town where the land lies" (Springfield) within the meaning of G.L. c. 244, § 14 (the "*Boston Globe* issue"); and, (2) as the *plaintiffs themselves* phrased it, did the plaintiffs have "the right . . . to foreclose the subject mortgage in light of the fact that the assignment of the foreclosed mortgage into the Plaintiff was *not executed or recorded* until *after* the exercise of the power of sale" (the "present holder of the mortgage issue").[6] *Ibanez*, Plaintiff's Motion for Entry of Default Judgment at 1-2 (Jan. 30, 2009) (emphasis added); *Larace*, Plaintiff's Motion for Entry of Default Judgment at 2 (Feb. 2, 2009) (same).[7] Both of these issues were identified at early conferences in the cases and both were

[6] In the Notice of Mortgagee's Sale of Real Estate in both *Ibanez* and *Larace*, the plaintiffs (U.S. Bank in *Ibanez* and Wells Fargo in *Larace*) represented themselves to be "the present holder of said mortgage."

[7] The "present holder of the mortgage issue" was present in a different form in *Rosario*. There (as proved decisive, *see* Memorandum and Order on Plaintiffs' Motions for Entry of Default Judgment at 14-17 (Mar. 26, 2009)), a mortgage assignment to the foreclosing party in recordable form *had* been executed, but it was *not* recorded prior to the notice and sale. Thus, the issue as phrased in *Rosario* was whether the plaintiff had "the right . . . to foreclose the subject mortgage in light of the fact that the assignment of the foreclosed mortgage into the Plaintiff was not *recorded* until after the exercise of the power of sale." *Rosario*, Plaintiff's Motion for Entry of Default Judgment at 2 (Feb. 2, 2009) (emphasis added). As the court's Memorandum reflected, Massachusetts law requires that a foreclosing party have a valid assignment of the mortgage at the time of notice and sale, but it does *not* require the assignment to be "of record" at that time. Memorandum and Order on Plaintiffs' Motions for Entry of Default Judgment at 14-17. Thus, the foreclosure sale in *Rosario* was valid and the sales in *Ibanez* and *Larace* were not. *Id.*

briefed and argued by the plaintiffs in connection with their motions for default judgment.[8]

The *Boston Globe* issue was resolved favorably to the plaintiffs in all three cases and judgment entered declaring that none of the three foreclosures was rendered invalid because notice was published in the *Boston Globe*. Judgment (Mar. 26, 2009). The "present holder of the mortgage issue," however, was decided against the plaintiffs in *Ibanez* and *Larace*. *Id.* This was because the factual allegations in the complaints (binding on the plaintiffs pursuant to G.L. c. 231, § 87) showed that neither U.S. Bank (in *Ibanez*) nor Wells Fargo (in *Larace*) was the holder of the mortgage (either on or off record) at the time notice of the foreclosure sale was given or at the time the sale took place. According to those allegations, both were assigned the mortgage long *after* the foreclosure sales occurred.[9] Thus, on those facts, as a matter of law, the sales were invalid. *See* Memorandum and Order on Plaintiffs' Motions for Entry of Default Judgment at 2-4, 8-17 (Mar. 26, 2009). Final judgment was entered making that declaration. Judgment (Mar. 26, 2009).

U.S. Bank (in *Ibanez*) and Wells Fargo (in *Larace*) have now timely moved to vacate that judgment making, in essence, five arguments. First, they contend that the "present holder of the

---

[8] *See Ibanez*, Plaintiff's Motion for Entry of Default Judgment at 1-2 (Jan. 30, 2009), oral argument of motion (Feb. 11, 2009) and Plaintiff's Second Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment at 1-2 (Feb. 16, 2009); *Larace*, Plaintiff's Motion for Entry of Default Judgment at 2 (Feb. 2, 2009), oral argument of motion (Feb. 11, 2009), and Plaintiff's Second Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment at 1-2 (Feb. 16, 2009); and *Rosario*, Plaintiff's Motion for Entry of Default Judgment at 1-2 (Feb. 2, 2009), oral argument of motion (Feb. 11, 2009) and Plaintiff's Second Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment at 1-2 (Feb. 16, 2009).

The issues were addressed in the context of a motion for default judgment because the defendants in *Ibanez*, *Larace*, and *Rosario* each had been defaulted for failure timely to respond to the complaints. The defendants in *Ibanez* and *Larace* have subsequently (post-judgment) entered an appearance through counsel and oppose the plaintiffs' motions to reconsider and vacate that judgment.

[9] As set forth in the complaints, the notices in *Ibanez* and *Larace* were published on June 14, 21, and 28, 2007 for auctions that took place on July 5, 2007. *Ibanez*, Complaint at 2, ¶ 5; 3, ¶ 8; *Larace*, Complaint at 2, ¶ 5; 3, ¶ 8. The *Ibanez* notice named U.S. Bank as the foreclosing party, the *Larace* notice named Wells Fargo as the foreclosing party, and the foreclosure sales were conducted in their respective names. *Ibanez*, Complaint at 2, ¶ 5; 3, ¶ 8; *Larace*, Complaint at 2, ¶ 5; 3, ¶ 8. As established by the allegations in the Complaints, however, U.S. Bank was not assigned the *Ibanez* mortgage until September 2, 2008, fourteen months after the sale (*Ibanez*, Complaint at 2, ¶ 3), and Wells Fargo was not assigned the *Larace* mortgage until May 7, 2008, ten months after the sale (*Larace*, Complaint at 2, ¶ 3).

mortgage issue" came as a surprise to them and should not have been decided in connection with these cases.[10] Second, they argue that had they known the issue was going to be addressed, they would have pled their case differently and either limited their request for relief to the "*Boston Globe* issue" or further supplemented their evidentiary offerings.[11] Third, they insist that since the defendants had been defaulted,[12] it was inappropriate for judgment to be entered *against* the plaintiffs and, at worst, their motion for default judgment should simply have been denied with leave for them to amend and try again.[13] Fourth, based on new evidence and new arguments they have now submitted post-judgment,[14] they maintain they *were* the "present holder of the mortgage" within the scope and meaning of G.L. c. 244, § 14 at the time of notice and sale. This is so, they say, because they possessed the note (endorsed in blank), an assignment of the mortgage in blank (*i.e.*, without an identified assignee), and a contractual right to obtain the mortgage at those times.[15] Fifth, in the event the court disagrees that their possession of the note, a mortgage assignment in blank, and a contractual right sufficed to make them "present holders of the mortgage," they contend that the foreclosure sales were nonetheless valid because they were authorized by the last record holder of the mortgage and the plaintiffs acted as the "agent" of that holder.

For the reasons more fully set forth below, each of these arguments fails. I thus **DENY** the motions to vacate. The plaintiffs cannot credibly claim surprise at the judgment that was entered and, having asked for (and received) a declaration on the issues *they chose* and on the

---

[10] *See Ibanez*, Motion to Vacate Judgment at 3, 4 (Apr. 6, 2009); *Larace*, Motion to Vacate Judgment at 3, 4 (Apr. 6, 2009).

[11] *Id.*

[12] As noted above, the defendants have since each entered an appearance through counsel.

[13] *See Ibanez*, Motion to Vacate Judgment at 7; *Larace*, Motion to Vacate Judgment at 7.

[14] These post-judgment evidentiary submissions were allowed by leave of court. *Ibanez*, Notice of Docket Entry (Apr. 21, 2009); *Larace*, Notice of Docket Entry (Apr. 21, 2009).

[15] They concede, however, that the mortgage assignment they ultimately recorded (an assignment specifically to them) was an entirely new and different document, executed months after the notice and sale.

facts *exactly as they pled them*, they have no right to a "do-over" because the declaration was not entirely as they wished. Moreover, their newly-presented facts do not lead to a different result. Instead, they show that the *plaintiffs themselves* recognized that they needed mortgage assignments *in recordable form explicitly to them* (not in blank) prior to their initiation of the foreclosure process, that the plaintiffs' "authorized agent" argument fails both on its facts and as a matter of law, and reaffirm the correctness of the original judgment. They also show that the problem the plaintiffs face (the present title defect) is entirely of their own making as a result of their failure to comply with the statute and the directives in their own securitization documents. Simply put, the foreclosure sales were invalid because they failed to meet the requirements of G.L. c. 244, § 14. What the plaintiffs *truly* seek is a change in the foreclosure sale statute (G.L. c. 244, § 14), which can only come from the legislature.

Analysis

The Plaintiffs Were Not Surprised That Their Status as Mortgage Holders at the Time of Notice and Sale Would Be an Issue in Connection With Their Motions for Default Judgment

The plaintiffs cannot credibly claim they were surprised that their status as mortgage holders at the time of notice and sale would be an issue in these cases. Nor can they be surprised that a judgment might be entered against them on that issue. The relief they requested included a broad declaration that the defendant/equity holders' right, title and interest in the properties at issue was extinguished by the judgments in the Servicemembers' cases and the execution of the powers of sale contained in the mortgages. They further sought a declaration that title in fee simple was vested in the plaintiffs as a result of those sales.[16] This necessarily involved their

[16] *Ibanez*, Complaint at 3-4, ¶¶ 1-4 (Sept. 12, 2008); *Larace*, Complaint at 3-4, ¶¶ 1-4 (Oct. 23, 2008); *see also Ibanez*, Motion for Entry of Default Judgment at 8 (Jan 30, 2009) ("plaintiff moves the Court for entry of judgment thereby order[ing], adjudging and decreeing that defendant's right, title and interest in the property was extinguished by the judgment on the complaint to foreclose mortgage and the execution of the power of sale contained in the mortgage by plaintiff"). The plaintiffs' current argument that these actions "presented only one

compliance with G.L. c. 244, § 14 since they could only conduct a valid sale if they met its requirements. *Bottomly v. Kabachnick*, 13 Mass. App. Ct. 480, 483-484 (1982); *McGreevey v. Charlestown Five Cents Savings Bank*, 294 Mass. 480, 484 (1936) and cases cited therein.

The plaintiffs' complaints each stated that the mortgages containing the power of sale were assigned to them only *after* the sales took place.[17] In a widely-noticed decision, the United States Bankruptcy Court for the District of Massachusetts previously held that "[a]cquiring the mortgage after the entry and foreclosure sale does not satisfy the statute [G.L. c. 244, § 14]. While 'mortgagee' has been defined to include assignees of a mortgage, in other words the current mortgagee, there is nothing to suggest that one who expects to receive the mortgage by assignment may undertake any foreclosure activity." *In re Sima Schwartz*, U.S. Bankr. Ct., D. Mass., Chap. 7 Case No. 06-42476-JBR, Memorandum of Decision on Motion for Relief at 7 (Apr. 19, 2007). The plaintiffs were thus requested to address this issue in connection with their motions for entry of default judgment. Indeed, each of those motions explicitly noted that this request had been made[18] and proceeded to argue the point at length.[19] In short, the plaintiffs

---

issue: was the Boston Globe a newspaper of general circulation in Springfield for purposes of G.L. c. 244, § 14 for purposes of the subject foreclosure" (*Ibanez*, Motion to Vacate Judgment at 4 (Apr. 6, 2009); *Larace*, Motion to Vacate Judgment at 4 (Apr. 6, 2009)) is thus without basis.

[17] *See* n. 9, *supra*. Indeed, their motions for entry of default judgment reaffirmed this fact. *Ibanez*, Motion for Entry of Default Judgment at 2 (Jan. 30, 2009) ("the assignment of the foreclosed mortgage was not executed or recorded until after the exercise of the power of sale"); *Larace*, Motion for Entry of Default Judgment at 2 (Feb. 2, 2009) ("the assignment of the foreclosed mortgage was not executed or recorded until after the exercise of the power of sale"). The court's judgment assumed these facts to be true and, confining itself to these and the other facts contained in the complaints, ruled accordingly. *Prudential-Bache Securities, Inc. v. Comm'r of Revenue*, 412 Mass. 243, 249 (1992); *Eagle Fund, Ltd. v. Sarkans*, 63 Mass. App. Ct. 79, 82 n. 8 (2005); *see also Bright v. American Felt Co.*, 343 Mass. 334, 336 (1961). The plaintiffs' current argument that "the court undertook to adopt facts and make rulings of law outside the scope of the pleadings and the record before it" (*Ibanez*, Motion to Vacate Judgment at 1-2; *Larace*, Motion to Vacate Judgment at 1-2) is thus without basis.

[18] "Sua sponte, the Court has also raised an additional issue concerning the right of the Plaintiff to foreclose the subject mortgage in light of the fact that the assignment of the foreclosed mortgage into the Plaintiff was not executed or recorded until after the exercise of the power of sale." *Ibanez*, Plaintiff's Motion for Entry of Default Judgment at 2 (Jan. 30, 2009); *Larace*, Plaintiff's Motion for Entry of Default Judgment at 2 (Feb. 2, 2009).

[19] *Ibanez*, Motion for Entry of Default Judgment at 5-6 (Jan. 30, 2009), Second Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment at 1-8 (Feb. 16, 2009); *Larace*, Motion for Entry of Default Judgment at 5-6 (Feb. 2, 2009), Second Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment at 2-8 (Feb. 16, 2009); *see also* oral argument of the motions (Feb. 11, 2009) (digitally

were not surprised in the slightest that the "present holder of the mortgage issue" would be addressed in the court's ultimate resolution of the case and cannot credibly argue otherwise.

Having Requested a Broad Declaration That They Held Fee Simple Title as a Result of the Foreclosure Sales and Having Been Put on Notice That Their Status as the "Present Holder of the Mortgage" at the Time of Notice and Sale Was an Issue In Connection With That Declaration, the Plaintiffs Cannot Now Narrow That Request and Vacate the Part of the Judgment That They Dislike

Lawsuits are a serious matter and are not a place for "do-overs." When a point is in issue, a litigant cannot wait for the court's decision and, if dissatisfied, amend its pleadings to remove that issue. *See Johnston v. Box*, 453 Mass. 569 (2009) (denying motion to amend after complaint had been dismissed). The principle behind this is simple and fundamental. Litigants are expected to "investigate their claims before filing a complaint so that they have a basis at the outset to make particularized factual allegations in the complaint." *Id.* at 575, n.11 (quoting *White v. Panic*, 783 A.2d 543, 555-56 (Del. 2001)). Likewise, when a plaintiff requests a declaration of the parties' rights as its prayer for relief, it has no grounds to object when that declaration is made, even if it is different from the one it desired. *Bright v. American Felt Co.*, 343 Mass. 334, 336 (1961) ("The decree taking the petition for confessed did not ensure a decree for the petitioner. It only established as true the facts properly pleaded, and required the entry of whatever decree those facts demanded."). If the plaintiffs wanted something different or narrower than what their complaints requested, they were obligated to say so explicitly.

The plaintiffs' complaints requested two broad declarations. *First*, they sought a declaration that the defendant/equity holder's rights in the property were totally extinguished by the foreclosure sale. *Second*, they sought a declaration that, as a result of that sale, the plaintiffs now held fee simple title. Those requests were never amended or withdrawn, in whole or in part. Having been asked to declare the parties' rights and with nothing in the record showing

---

recorded).

"sufficient reasons" for refusal, the court was required to give that declaration and did so. G.L. c. 231A, §§ 1-2.

Having Been Requested to Give a Declaratory Judgment, the Court Is Not Restricted, Even in a Default Situation, to Give a Judgment Favorable to the Moving Party

When presented with a motion for entry of default judgment, the court is required to take as true all properly pleaded factual allegations in the plaintiff's complaint. *Eagle Fund, Ltd. v. Sarkans*, 63 Mass. App. Ct. 79, 82 n.8 (2005). But the court is *not* bound by the legal conclusions in the complaint. *Id.* Rather, it "has the duty to enter a judgment that is lawful in light of the facts established, even in the absence of a contest before him" and even when that judgment may be unfavorable to the moving party. *Prudential-Bache Securities, Inc.*, 412 Mass. 243, 249 (1992); *Bright*, 343 Mass. at 336. The plaintiffs are thus wrong when they argue it was inappropriate for an unfavorable judgment to be entered against them. The facts alleged in their complaints (a post-notice, post-sale mortgage assignment to the plaintiffs) were taken as true, exactly as pled. Those facts required the judgment that was entered. Memorandum and Order on Plaintiffs' Motions for Entry of Default Judgment at 2-4, 8-17 (Mar. 26, 2009).

The Plaintiffs' Arguments in Support of their Motions to Vacate Fail on Their Merits

The plaintiffs' motions to vacate the judgment could be denied simply on the basis of the facts and analysis outlined above. The plaintiffs were not surprised, but instead were on full notice of the matters at issue and the precise issues decided,[20] all of which were inherent in the scope of the relief they sought. The judgment entered by the court was based on the facts

[20] The issue relevant here, as the plaintiffs themselves recognized, was "[t]he right of the Plaintiff to foreclose the subject mortgage in light of the fact that the assignment of the foreclosed mortgage into the Plaintiff was not *executed or recorded* until *after* the exercise of the power of sale." *Ibanez*, Plaintiff's Motion for Entry of Default Judgment at 1-2 (Jan. 30, 2009) (emphasis added); *Larace*, Plaintiff's Motion for Entry of Default Judgment at 2 (Feb. 2, 2009) (same).

contained in their complaints, and solely on those facts.[21] The plaintiffs were given full opportunity to make their case, factually and legally, at the time they briefed and argued their motions for entry of default judgment. Indeed, they were given (and took) the opportunity to file supplemental memoranda even after oral argument. The law has not changed and the judgment was a straightforward application of the law to the facts as the plaintiffs pled them. *See*

[21] The plaintiffs' argument that I went outside the pleadings to make "findings" regarding the foreclosure auctions and the subsequent months-long delay before the plaintiffs received assignments of the mortgages is, once again, completely without basis. The actual facts recited (the appraised value of the properties, the amount of the mortgages, the amount of the plaintiffs' bids, the fact that the plaintiffs were the only bidders, and the fact that the plaintiffs took months to prepare and execute the assignment documents) came directly from the plaintiffs' pleadings and (with respect to the plaintiffs being the only bidders) from the plaintiffs' admission at oral argument. They were confirmed, once again, in their motions to vacate. *Ibanez*, Motion to Vacate Judgment at 19; *Larace*, Motion to Vacate Judgment at 19. The further discussions based on those facts (the likely chilling of other bids due to the plaintiffs' inability at the time of sale to show (by proof of a valid mortgage assignment) their legal capacity to convey title and the consequent damage to the borrower) were not "factual findings" *per se*, but rather (by fair inference) a demonstration of a rational basis for the statutory requirement that the party conducting the sale have a valid mortgage assignment in recordable form and in its possession at the time of notice and sale. Moreover, *the plaintiffs' own post-judgment submissions* have made the soundness of these discussions even more apparent. It took the plaintiffs over *two months* after they filed their motions to vacate the judgment (from April 6 to June 8, 2009) to gather the documents that they believed were necessary to show their status as purportedly valid assignees of the mortgages at the time of the notice and sale. The reasons they gave for needing that time (what they themselves described as "the problem") are telling — "the size of the documents themselves," "the number of documents which must be taken together to capture the entire transaction," "the fact that some of the documents contain industry sensitive and confidential business practices information" (if so, none were produced), and "[f]inally, the economic crisis itself [which] has impacted both the Custodians of these documents (the Trustees for the Securitized Trusts or their designee) and the loan servicers employed by them (increased foreclosure workload compounded by decreased staffing due to financial losses)." *Ibanez*, [Plaintiff's] Motion for Extension of Time to File Third Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment at 5 (May 27, 2009); *Larace*, [Plaintiff's] Motion for Extension of Time to File Third Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment at 5 (May 27, 2009). This does not inspire confidence. Indeed, many of the documents were never produced. Moreover, left unsaid (and equally telling) is the fact that the major entities now revealed as central to these transactions are presently either in bankruptcy (Lehman Brothers), out of business (Option One Mortgage Corporation, some of whose assets were sold to AH Mortgage Acquisition Co., Inc., now renamed American Home Mortgage Servicing, Inc.), or required billions of dollars in government aid (Bank of America). It is surely a fair inference that this would make potential bidders even *more* unwilling to bid (or sharply discount their bids) without the plaintiffs' ability to show that they were valid "holders of the mortgage" and thus were able to convey title at the time of the sale. How else would they have any assurance that potentially critical documents and authorizations could be obtained in timely fashion thereafter? *See* Memorandum and Order on Plaintiffs' Motions for Entry of Default Judgment at 9-10.

In any event, no factual demonstration of rationality was needed to uphold the statute (G.L. c. 244, § 14) since its rationality is apparent on its face. A mortgage is a contract. It is fundamental and basic that a party seeking to exercise a contractual right (here, the power of sale) has the contractual right to do so at the time of its exercise. As the statute recognizes, these are the mortgagee or his valid assignee, a person specifically authorized by the power of sale, or an attorney, legal guardian or conservator of those persons acting in the name of those persons. *See McGreevey*, 294 Mass. at 484 ("It is familiar law that one who sells under a power must follow strictly its terms. If he fails to do so there is no valid execution of the power and the sale is wholly void"); *see also* G.L. c. 183, § 21 ("statutory power of sale" in mortgage, recognizing that person seeking to exercise the power must "first comply[] with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale").

Memorandum and Order on Plaintiffs' Motions for Entry of Default Judgment at 8-17.

Having said this, however, it is clearly of importance, not only to the litigants, but also to others, that the plaintiffs' new facts and new arguments be addressed on their merits since they are alleged to be common to many securitized loans.[22] In essence, the plaintiffs argue that those facts — none of which were on record at the Registry at the time of notice and sale, all of which require a close reading of a complex set of securitization documents, and many of which lack proper evidentiary support[23] — show them to have been "the mortgagee or person having his [the mortgagee's] estate in the land mortgaged" at the time of notice and sale or, in the alternative, that their foreclosure was valid because they acted at the direction (although *not* in the name) of an alleged agent "of such mortgagee or person." G.L. c. 244, § 14. Even taking the new facts as the plaintiffs allege them as true, however, does not change the result in this case. As discussed below, the plaintiffs were *not* the present holders of the mortgage at the time of the notice and sale. They were *not* properly authorized by the mortgage holder at those times. Even if their counsel *were* acting at the direction of an agent for a party that, in another capacity, coincidentally *was* the mortgage holder, the notice and conduct of the foreclosure sale in the *plaintiffs'* names under the incorrect representation that *the plaintiffs* were the mortgage holders makes the sales invalid. And, for the reasons previously held, retroactive assignments, long after notice and sale have taken place, do not cure the statutory defects.

---

[22] I am puzzled at this since, as noted above and discussed more fully below, the plaintiffs' own securitization documents *required* mortgage assignments to be made to the plaintiffs in recordable form for *each and every loan* at the time the plaintiffs acquired them. Surely, compliance with this requirement would (and certainly *should*) have been a priority for an entity issuing securities dependent on recoveries from loans, such as these, known from the start to have a higher than normal risk of delinquency and default. *See* Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z Private Placement Memorandum at 21-43 (Dec. 26, 2006) (hereafter "*Ibanez* Private Placement Memorandum") (discussion of "Risk Factors"); ABFC Asset-Backed Certificates, Series 2005-OPT1 Prospectus Supplement at S-14 – S-25 (Oct. 27, 2005) (hereafter "*Larace* Prospectus Supplement") (discussion of "Risk Factors").

[23] *See* Memorandum of Antonio Ibanez in Opposition to Plaintiff's Motion to Vacate Judgment at 1-27 (Jun. 29, 2009).

The Facts As Newly Supplemented

In relevant part, if taken as alleged, the facts in *Ibanez* and *Larace* are roughly parallel and can be summarized as follows.[24]

Both *Ibanez* and *Larace* involved adjustable-rate, subprime loans for the purchase of residential property in Springfield.[25] In both, the borrower signed a promissory note and gave an immediately-recorded mortgage to the original lender (Rose Mortgage in *Ibanez*, Option One Mortgage Corporation in *Larace*). In *Ibanez*, Rose endorsed the note and properly assigned the mortgage to Option One.[26] In both *Ibanez* and *Larace*, Option One then executed an endorsement of the note in blank, making the note "payable to bearer" and "negotiated by transfer alone until specially endorsed." G.L. c. 106, § 3-205(b). In both, Option One also executed an assignment of the mortgage in blank (*i.e.*, without a specified assignee) (hereafter, the "blank mortgage assignments"). These blank mortgage assignments were never recorded and they were not legally recordable. G.L. c. 183, § 6C (for a mortgage or assignment of a mortgage to be recordable in Massachusetts, the mortgage or assignment must "contain or have endorsed upon it the residence and post office address of the mortgagee or assignee if said mortgagee or assignee is a natural person, or a business address, mail address or post office address of the mortgagee or assignee if the mortgagee or assignee is not a natural person"). Moreover, since the blank mortgage assignments failed to name an assignee, they were ineffective to transfer any

---

[24] In light of my rulings on these motions, I need not and do not decide if each of these facts (other than those appearing in the Registry records) is true. The defendants have noted many that lack proper evidentiary support in the present record (*see*, *e.g.*, n. 23, *supra*) and they argue that now that they have entered appearances, it is inappropriate to enter a judgment against them in any way dependent upon these challenged facts.

[25] Subprime loans are those that "do not meet the customary credit standards of Fannie Mae and Freddie Mac" and are made to borrowers "that typically have limited access to traditional mortgage financing for a variety of reasons, including impaired or limited past credit history, lower credit scores, high loan-to-value ratios or high debt-to-income ratios." *Larace* Supplemental Prospectus at S-14. "As a result of these factors, delinquencies and liquidation proceedings are more likely with these mortgage loans than with mortgage loans that satisfy customary credit standards." *Id.*

[26] This assignment of the mortgage was duly recorded at the Registry.

interest in the mortgage.[27] *Flavin v. Morrissey*, 327 Mass. 217, 219 (1951); *Macurda v. Fuller*, 225 Mass. 341, 344-345 (1916); A. Eno & W. Hovey, 28 Mass. Practice: Real Estate Law, § 4.50 at 109 (4th ed. 2004) (hereafter, "Eno & Hovey") and cases cited therein.

The securitization process then began, with Option One becoming the "Originator" for Lehman Brothers in *Ibanez* and for Bank of America in *Larace*.

In *Ibanez*, Lehman Brothers (as "Sponsor" and "Seller") purchased the loan from Option One (as the Originator). Lehman then sold it (with hundreds of other loans that originated from Option One and other sources) to its wholly-owned subsidiary, Structured Asset Securities Corporation (the "Depositor"). Structured Asset Securities Corporation subsequently sold the loans to the Structured Asset Securities Corporation Mortgage Loan Trust 2006-Z (with U.S. Bank as trustee)[28] (the "Issuing Entity"), which the grouped them into a "pool" (the "*Ibanez* pool") and issued ten classes of certificates (two senior and eight subordinate) with varying rates of return, ranked in order of their payout priority in the event of shortfalls. Lehman purchased the certificates (presumably as the underwriter of the offering) and sold them in an offering to qualified investors.

The loans in the *Ibanez* pool were administered by five "Servicers," one of which was Option One (now acting in a different capacity than Originator).[29] Option One is alleged to be

---

[27] This is so because Massachusetts follows the "title theory" of mortgages, making them a type of deed. *Faneuil Investors Group, L.P. v. Bd. of Selectmen of Dennis*, 75 Mass. App. Ct. 260, 264-265 (2009) ("Under our title theory of mortgages, a mortgage of real estate is a conveyance of the title or of some interest therein defeasible upon the payment of money or the performance of some other condition. Literally, in Massachusetts, the granting of a mortgage vests title in the mortgagee to the land placed as security for the underlying debt. The payment of the mortgage note terminates the interests of the mortgagee and revests the legal title in the mortgagor."); *see also Lamson & Co. v. Abrams*, 305 Mass. 238, 240-241 (1940) (mortgage grants legal title to mortgaged premises); *Faneuil Investors*, 75 Mass. App. Ct. at 265-266 and cases cited therein (mortgage is "conveyance in fee," a "deed of conveyance"); *MacFarlane v. Thompson*, 241 Mass. 486, 489 (1922); *Adams v. Parker*, 78 Mass. 53, 53 (1858)

[28] I assume that this is the same entity as the plaintiff in *Ibanez* and that the plaintiff, therefore, was misnamed in that complaint.

[29] The *Ibanez* Private Placement Memorandum is quite explicit regarding the separateness of "Originators" and "Servicers" and the reasons for that separateness. *See* Private Placement Memorandum at 84 (explaining the "information barrier policies" intended to protect the trust's status as a holder in due course of the notes and insulate

the Servicer for the *Ibanez* loan.[30] These Servicers were supervised by Aurora Loan Services LLC (a wholly-owned Lehman subsidiary) (the "Master Servicer"). The loan documents themselves were kept by "Custodians" — Deutsche Bank, Wells Fargo, or U.S. Bank.[31]

Assuming that events proceeded in the way described, the *Ibanez* loan thus changed ownership at least four times prior to foreclosure — Rose Mortgage to Option One, Option One to Lehman Brothers, Lehman Brothers to Structured Asset Securities Corporation, and Structured Asset Securities Corporation to Structured Asset Securities Corporation Mortgage Loan Trust 2006-Z (with U.S. Bank as trustee) — without any of this appearing on the public record. Two of those entities (Lehman Brothers and its subsidiary Structured Asset Securities Corporation) are currently in bankruptcy and a third (Option One) has ceased operations.[32] The *Ibanez* note, Rose's endorsement of the note to Option One, Option One's endorsement of the note in blank, Ibanez's mortgage to Rose, Rose's assignment of the mortgage to Option One, and Option One's blank mortgage assignment were all placed into a "collateral file" and, presumably, were passed from hand to hand along the chain of entities just listed, ending with the Custodian. The note (endorsed in blank and thus "bearer paper") was negotiable by whichever entity possessed it. Since the blank mortgage assignment was ineffective, the mortgage remained with Option One (as Originator).

In *Larace*, Bank of America (as "Seller") purchased the loan from Option One (as Originator). Bank of America then sold it (with hundreds of other loans that originated from Option One and other sources) to its wholly-owned subsidiary Asset Backed Funding

---

it from claims of fraud, misrepresentation, etc. in the making of the loans).

[30] There is no admissible proof in the record to establish this, but, as with the other facts set forth herein, I assume it to be true for the purpose of these motions.

[31] Both this and the *Larace* structures seem oddly complex, particularly when so many of the entities are effectively the same (either Lehman Brothers or its subsidiaries in *Ibanez* and either Bank of America or its subsidiaries in *Larace*). *But see* n. 29, *supra.*

[32] Massachusetts Secretary of State's Office, Option One Mortgage Corporation, Foreign Certificate of Withdrawal (Jul. 14, 2008).

Corporation (the "Depositor"). Asset Backed Funding Corporation then sold the loans to the ABFC 2005-OPT1 Trust (with Wells Fargo as trustee)[33] (the "Issuing Entity"), which grouped them into a "pool" (the "*Larace* pool") and issued fourteen classes of certificates (two super-senior, three senior, and nine subordinate) with varying rates of return, ranked in order of their payout priority in the event of shortfalls. Bank of America Securities LLC (as "Underwriter") purchased the certificates and sold them in an offering to the public. The loans in the *Larace* pool were administered by Option One as "Servicer" (again, as in *Ibanez*, acting in a different capacity than Originator).

Assuming that events proceeded in the way described, the *Larace* loan thus changed ownership at least three times — Option One to Bank of America, Bank of America to Asset Backed Funding Corporation, and Asset Backed Funding Corporation to ABFC 2005-OPT1 Trust (with Wells Fargo as trustee) — without any of this appearing on the public record. The *Larace* note to Option One, Option One's endorsement of the note in blank, Larace's mortgage to Option One, and Option One's blank mortgage assignment were all placed into a "collateral file" and, presumably, were passed from hand to hand along the chain of entities just listed, ending with the Custodian. The note (endorsed in blank and thus "bearer paper") was negotiable by whichever entity possessed it. Since the blank mortgage assignment was ineffective, the mortgage remained with Option One (as Originator).

As noted above, the plaintiffs sold certificates in offerings to investors and, in that connection, issued offering documents. These included the *Ibanez* Private Placement Memorandum and the *Larace* Prospectus Supplement. Both contained detailed descriptions of the characteristics of the subprime residential loans that the plaintiffs were acquiring, the "risk

[33] I assume that this is the same entity as the plaintiff in *Larace* and that the plaintiff, therefore, was misnamed in that complaint.

factors" involved with those loans, and the documentation that the trusts purportedly would receive to obtain and secure their interests in the loans and lessen those risks. The provisions regarding that documentation are substantially similar.

In *Ibanez* they stated the following:

> The Mortgage Loans will be assigned by the Depositor [Structured Asset Securities Corporation] to the Trustee [U.S. Bank], together with all principal and interest received with respect to such Mortgage Loans on and after the Cut-off Date [December 1, 2006] (other than Scheduled Payments due on that date). . . . Each Mortgage Loan will be identified in a schedule appearing as an exhibit to the Trust Agreement which will specify with respect to each Mortgage Loan, among other things, the original principal balance and the Scheduled Principal Balance as of the close of business on the Cut-off Date, the Mortgage Rate, the Scheduled Payment, the maturity date, the related Servicer and the Custodian of the mortgage file, whether the Mortgage Loan is covered by a primary mortgage insurance policy and the applicable Prepayment Premium provisions, if any.
>
> *As to each Mortgage Loan, the following documents are generally required to be delivered to the applicable Custodian on behalf of the Trustee in accordance with the Trust Agreement*: (1) the related original mortgage note endorsed without recourse to the Trustee or in blank, (2) the original mortgage with evidence of recording indicated thereon (or, if such original recorded mortgage has not yet been returned by the recording office, a copy thereof certified to be a true and complete copy of such mortgage sent for recording), (3) *an original assignment of the mortgage to the Trustee or in blank* ***in recordable form*** (except as described below),[34] (4) the policies of title insurance issued with respect to each Mortgage Loan and (5) the originals of any assumption, modification, extension or guaranty agreements.
>
> Each transfer of a Mortgage Loan from the Seller [Lehman Brothers Holdings, Inc.] to the Depositor [Structured Asset Securities Corporation] and from the Depositor to the Trustee will be intended to be a sale of that Mortgage Loan and will be reflected as such in the Sale and Assignment Agreement[35] and the Trust Agreement, respectively. . . .

---

[34] The "exception" (not applicable here) is where "the mortgages or assignments of mortgage [had] been recorded in the name of an agent [*e.g.*, Mortgage Electronic Registration Services ("MERS")] on behalf of the holder of the related mortgage note." *Ibanez* Private Placement Memorandum at 119. Here, the mortgage was recorded in the name of the original mortgagee (Rose) and subsequently assigned by Rose to Option One (in Option One's own name and not as an agent). Any argument plaintiff seeks to make that Option One was acting as an agent for the Trust (or any other entity) is belied not only by the wording of the assignment (Option One named individually), but also by the Private Placement Memorandum that made both the separateness of the trust and the reason for that separateness explicit and clear. *See* Private Placement Memorandum at 84 (explaining "information barrier policies," plainly designed to protect the Trust's status as a holder in due course of the notes).

[35] The plaintiff has not provided this document to the court. According to the Private Placement Memorandum, it was "the mortgage loan sale and assignment agreement dated as of December 1, 2006 between the Seller [Lehman Brothers Holdings, Inc.] and the Depositor [Structured Asset Securities Corporation]." *Ibanez* Private Placement Memorandum at 193. According to the Private Placement Memorandum, Lehman Brothers had previously purchased the mortgage loans directly from the Transferors (including Option One) in a series of separate

Ibanez Private Placement Memorandum at 119 (emphasis added). Moreover, the Memorandum further states that each Transferor of a mortgage loan (here, Option One) represented and warranted to Lehman "as direct purchaser or assignee" that "the assignment of mortgage [to Lehman] [was] in recordable form and acceptable for recording under the laws of the relevant applicable jurisdiction." *Id.* at 120-121. Assignments in recordable form to each successive entity were thus required at every step in the securitization chain.

In *Larace* they stated the following:

> On or about October 31, 2005 . . . the Depositor [Asset Backed Funding Corporation] will transfer to the Trust Fund all of its right, title and interest in and to each Mortgage Loan, the related mortgage notes, mortgages and other related documents (collectively, the "Related Documents"), including all scheduled payments with respect to each such Mortgage Loan due after the Cut-Off Date. . . .
>
> The Pooling and Servicing Agreement will require that, within the time period specified therein, the Seller [Bank of America] will deliver or cause to be delivered to the Trustee on behalf of the Certificateholders (or a custodian, as the Trustee's agent for such purpose) the mortgage notes endorsed in blank and the Related Documents. In lieu of delivery of original mortgages or mortgage notes, if such original is not available or lost, the Seller may deliver or cause to be delivered true and correct copies thereof, or, with respect to a lost mortgage note, a lost note affidavit executed by the Seller or the originator of such Mortgage Loan.
>
> *Unless otherwise required by Fitch or S&P, assignments of the Mortgage Loans to the Trustee (or its nominee) will not be recorded in any jurisdiction, but will be delivered to the Trustee* ***in recordable form****, so that they can be recorded in the event recordation is necessary in connection with the servicing of a Mortgage Loan.*[36]

Larace Supplemental Prospectus at S-54 (emphasis added).[37]

Sale Agreements. *Id.* at 193, 199.

[36] The Supplemental Prospectus makes only one exception to this requirement, not applicable here. This exception is for mortgage loans recorded in the name of Mortgage Electronic Registration Systems, Inc. ("MERS") or its designee, in which case all that was required was "all actions as are necessary to cause the Trust to be shown as the owner of the related Mortgage Loan on the records of MERS for purposes of the system of recording transfers of beneficial ownership of mortgages maintained by MERS." *Larace* Supplemental Prospectus at S-54.

[37] The Pooling and Servicing Agreement required the Depositor (Asset Backed Funding Corporation), at the time of the execution and delivery of that agreement, to provide the Trustee (Wells Fargo) "the original Mortgage with evidence of recording thereon," "an original Assignment of Mortgage (which may be in blank), *in form and substance acceptable for recording*," and an original copy of any intervening assignment of mortgage showing a

Despite the requirement in both *Ibanez* and *Larace* for an assignment of the mortgage to the trusts in recordable form at the time the loans were transferred to the trusts, no such assignments were made. As the collateral files for both loans reveal, the only mortgage assignments executed prior to the foreclosure sales were the one from Rose Mortgage to Option One (in *Ibanez*) and the ineffective blank mortgage assignments by Option One (in both *Ibanez* and *Larace*). Thus, at the time the foreclosure sales were noticed and conducted, the notes (endorsed in blank without recourse and thus "bearer paper") were held by the plaintiffs, but the mortgages securing those notes were both still held by Option One (as Originator).

At some point (the record does not indicate when) both the *Ibanez* and *Larace* loans became delinquent and a new entity (Fidelity National Foreclosure and Bankruptcy Solutions) ("Fidelity") became involved. On April 10, 2007, purporting to act on behalf of Option One in Option One's capacity as the Servicer of the loan,[38] Fidelity sent an email with an attached pdf referral package[39] to the plaintiffs' counsel (the Ablitt law firm) with instructions to bring a

---

complete chain of assignments" for each and every loan. *Larace*, Pooling and Servicing Agreement at Art. II, § 2.01 (ii), (iii) & (iv) (Oct. 1, 2005) (emphasis added). The same provisions appear in the Mortgage Loan Purchase Agreement in identical language. Mortgage Loan Purchase Agreement at Art. II, § 2.02 (ii), (iii) & (iv) (Oct. 1, 2005). As noted above, a blank mortgage assignment is neither recordable nor effective in Massachusetts. Thus, the assignment required by these agreements was one from the holder of the mortgage directly and explicitly to the trust, with the trust's name, business address, and mailing address or post office address either contained or endorsed on the assignment. G.L. c. 183, § 6C.

[38] I say this based on the affidavits of Walter Porr, Jr. in which he claimed that the foreclosure referrals in both *Ibanez* and *Larace* came "from Option One Mortgage Corporation" even though the documents he attached and/or referenced in support of that statement came from Fidelity. *Ibanez*, Aff. of Walter Porr, Jr. (Jan 30, 2009); *Larace*, Aff. of Walter Porr, Jr. (Feb. 2, 2009). That the foreclosure instructions in both *Ibanez* and *Larace* were given on behalf of Option One in its capacity as the Servicer of those loans and *not* for Option One as the "holder of the mortgage" (Originator) is clear from both the referral documents themselves and the affidavits filed at the Hampden County Registry of Deeds in connection with the subsequent foreclosure sales. *See Ibanez*, Aff. of Cindi Ellis (May 7, 2008) (submitted to the Registry for Option One "as attorney in fact for U.S. Bank National Association, as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006"); *Ibanez*, Massachusetts Foreclosure Deed By Corporation (May 7, 2008) (signed by Ms. Ellis for Option One as "attorney in fact" for U.S. Bank"); *Larace*, Power of Attorney (May 7, 2008) (signed by Ms. Ellis and referring to Option One as "attorney in fact for Wells Fargo"). Indeed, at oral argument, the plaintiffs' attorney stated that the foreclosure referrals came from "the loan servicers." Statement of Walter Porr, Jr. at oral argument (Apr. 17, 2009).

[39] The record does not include a copy of the referral package, so its contents (most of which are cryptically described as "screen prints") are unknown. *Ibanez*, Aff. of Walter Porr, Jr. at Ex. A (Jan. 30, 2009).

foreclosure action against Mr. Ibanez and his property "in the name of U.S. Bank National Association, as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z." *Ibanez*, Aff. of Walter Porr, Jr. at Exs. A-C (Jan. 30, 2009). On April 18, 2007, again purportedly on behalf of Option One in Option One's capacity as the Servicer of the loan,[40] Fidelity sent a similar email and pdf referral package to Ablitt with instructions to commence a foreclosure action against the Laraces and their property "in the name of the investor below: Wells Fargo Bank, N.A., as Trustee for ABFC 2005-OPT1 Trust, ABFC Asset-Backed Certificates, Series 2005-OPT1," with the representation that the *Larace* mortgage was "currently held" by Wells Fargo.[41] *Larace*, Aff. of Walter Porr, Jr. at Ex. A (Feb. 2, 2009).

The Ablitt firm then filed a Servicemembers' Complaint against Mr. Ibanez, naming U.S. Bank as the plaintiff under the representation that U.S. Bank was "the owner (or assignee) and holder of a mortgage with a statutory power of sale given by Antonio Ibanez to Rose Mortgage, Inc." Complaint to Foreclose Mortgage, Land Court 07 Misc. 345456 (Apr. 17, 2007). As noted above, this was incorrect. Option One was that holder. The Notice of Mortgagee's Sale of Real Estate, published on June 14, 21, and 28, 2007 for a foreclosure sale on July 5, 2007, stated that U.S. Bank was the "present holder" of the *Ibanez* mortgage. As noted above, this was incorrect. Option One was that holder. The *Ibanez* sale was conducted in the name of U.S. Bank, U.S. Bank was the only bidder, and the "foreclosure deed" executed ten months later named U.S. Bank as the grantor pursuant to that sale.[42] Massachusetts Foreclosure Deed By Corporation

---

[40] *See* n. 38, *supra*.

[41] Again, the record does not include a copy of the referral package, so its contents (most of which, again, are described as "screen prints) are unknown. *Larace*, Aff. of Walter Porr, Jr. at Ex. A (Feb. 2, 2009).

[42] U.S. Bank bought the property for $94,350, which was $16,437.27 less than the purported amount of the outstanding loan ($110,787.27) (leaving Mr. Ibanez liable for that deficiency) and $16,650 (15%) less than the bank's calculation of the property's actual market value ($111,000). *Ibanez*, Complaint at 3, ¶ 8; Aff. of Walter Porr, Jr. at Ex. G (Jan. 30, 2009).

(May 7, 2008). There was no mention or suggestion in *any* of these documents that U.S. Bank was proceeding to foreclose the mortgage on behalf of anyone other than itself. An assignment of the *Ibanez* mortgage to U.S. Bank from American Home Mortgage Servicing, Inc. as the purported "successor in interest to Option One Mortgage Corporation" was not executed until September 2, 2008, fourteen months *after* the foreclosure sale and over three months *after* the recording of the foreclosure deed.[43]

The Ablitt firm brought a Servicemembers' Complaint against the Laraces, naming Wells Fargo as the plaintiff under the representation that Wells Fargo was "the owner (or assignee) and holder of a mortgage with a statutory power of sale given by Mark A. Larace and Tammy L. Larace to Option One Mortgage Corporation." Complaint to Foreclose Mortgage, Land Court 07 Misc. 346369 (Apr. 27, 2007). As noted above, this was incorrect. Option One was the holder. The Notice of Mortgagee's Sale of Real Estate, published on June 14, 21, and 28, 2007 for a foreclosure sale on July 5, 2007, stated that Wells Fargo was the "present holder" of the *Larace* mortgage. As noted above, this was incorrect. Option One was the holder. The *Larace* sale was conducted in Wells Fargo's name, Wells Fargo was the only bidder, and the "foreclosure deed" executed ten months later named U.S. Bank as the grantor pursuant to that sale.[44] Massachusetts

---

[43] It is not clear from the record if American Home Mortgage Servicing, Inc. *was*, in fact, the "successor in interest" to Option One's interest in the mortgage (as Originator) and thus able to make a valid assignment of that interest. It may have been Option One's successor as the *Servicer* of the loan for U.S. Bank, but the two are not the same. So far as can be discerned from the record and a review of corporate filings at the Massachusetts Secretary of State's office, Option One ceased active operations in early 2008 (it withdrew its corporate registration in Massachusetts in July of that year) and American Home Mortgage Servicing (a newly-formed corporation, previously named AH Mortgage Acquisition Co., Inc.) purchased *some* of Option One's assets, but apparently not *all* and (so far as the record shows) *only* Option One's Servicing contracts. *See Larace*, Aff. of Michelle Halyard (Jun. 4, 2009) (describing American Home as "*a* [not *the*] successor in interest to Option One Mortgage Corporation's *Loan Servicing* operations" (emphasis added)). The asset purchase agreement has not been produced, so it is impossible to determine if Option One's interest in the *Ibanez* mortgage was among the assets purchased by American Home.

[44] Wells Fargo bought the property for $120,397.03, which was purportedly the amount of the outstanding loan, "plus all outstanding fees and costs" (*i.e.*, leaving no deficiency owed), but $24,602.97 (17%) less than the bank's calculation of the property's actual market value ($145,000). *Larace* Complaint at 3, ¶ 8; Aff. of Walter Porr, Jr. at Ex. E (Feb. 2, 2009).

Foreclosure Deed By Corporation (May 7, 2008). As in *Ibanez*, there was no mention or suggestion in any of these documents that Wells Fargo was proceeding to foreclose the mortgage on behalf of anyone other than itself. An assignment of the *Larace* mortgage to Wells Fargo from American Home Mortgage Servicing, Inc. as the purported "successor in interest to Option One Mortgage Corporation" was not executed until September 2, 2008, fourteen months *after* the foreclosure sale and over three months *after* the recording of the foreclosure deed.[45]

Analysis of the Newly Supplemented Facts

The Plaintiffs Were Not the Present Holders of the Mortgage at the Time of the Notice and Sale

To the extent the plaintiffs and their supporting *amici* request that I reconsider and reverse my previous ruling that the foreclosing party is statutorily required to be the "present holder of the mortgage" at the time of the notice and sale (*i.e.*, that post-sale mortgage assignments to the successful bidder, even if backdated, do not suffice), I decline. My reasons are explained in my previous Memorandum and I reaffirm them again. The statute's commands are clear, the plaintiffs' *own securitization documents* show that they knew of those requirements, and if they failed to follow them, the responsibility for the consequences is theirs. *Martha's Vineyard Land Bank Comm'n v. Bd. of Assessors of West Tisbury*, 62 Mass. App. Ct. 25, 27-28 (2004) ("Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent and the courts enforce the statute according to its plain wording, which we are constrained to follow so long as its application would not lead to an absurd result. When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all by the most extraordinary circumstance, is finished." (internal citations and quotations omitted)).

If they believe a change is warranted to reflect "industry standards and practice," they

[45] Again, it is not clear from the record if American Home Mortgage Servicing, Inc. was in fact the "successor in interest" to Option One's interest in the mortgage (as Originator) and thus able to make a valid assignment of that interest. *See* n. 43, *supra*.

must seek that change from the legislature. I note, however, that if those "standards and practice" have brought us to the present situation (*see, e.g.*, Chairman Ben Bernanke, *Financial Innovation and Consumer Protection*, speech at the Federal Reserve System's Sixth Biennial Community Affairs Research Conference (Apr. 17, 2009); R. Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent Into Depression* (Harvard University Press 2009)), "we should learn something from that experience." *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

Perhaps in recognition of this, the plaintiffs argue that they *were* the "present holder of the mortgage" or, for statutory purposes, should be *deemed* to be because they possessed the note, a blank mortgage assignment, and a series of off-record agreements by which they were entitled to (and should have received) a mortgage assignment in recordable form. That argument fails as well, for two reasons.

First, if, as here, the power being exercised is *contract based*, the party seeking to exercise it must be authorized *by that contract*. *See Roche v. Farnsworth*, 106 Mass. 509, 513 (1871) ("power must be executed in strict compliance with its terms"). Here, the only entities authorized by the mortgages to exercise the power of sale contained therein are the original mortgagees and the valid assignees of those mortgagees.[46] The plaintiffs were neither at the time

[46] The only person authorized by the *Ibanez* mortgage to invoke the power of sale is the "Lender," defined in the mortgage as Rose Mortgage, Inc. in its capacity as mortgagee. *Ibanez* Mortgage at 11, ¶ 22; 1, Definition (C). Thus, in full accordance with Massachusetts law (*see Ibanez* Mortgage at 9, ¶ 16, governing law is "federal law and the law of the jurisdiction in which the Property is located"), the mortgage authorizes only the mortgagee or a valid assignee of the mortgagee to invoke the statutory power of sale. *See Lamson & Co. v. Abrams*, 305 Mass. 238, 242 (1941) (assignee of properly-assigned mortgage succeeds to all of the mortgagee's rights in the property, leaving the assignor with none). This does *not* include a person or entity which only holds the note. *See Ibanez* Mortgage at 7, third full paragraph (distinguishing between "Lender" and "any purchaser of the Note"). Making this even more crystal clear is the mortgage's reference to the power of sale as the *statutory* power of sale (*Ibanez* Mortgage at 11, ¶ 22), which can be invoked only by "the mortgagee or his executors, administrators, successors or assigns." G.L. c. 183, § 21.

The same is true of the *Larace* mortgage. Only the original mortgagee or the valid assignee of the mortgagee can act under the power of sale. "Lender" is defined as Option One Mortgage Corporation. *Larace* Mortgage at 1. The law that governs the interpretation of the mortgage is "federal law and the law of the jurisdiction

of notice and sale because, as discussed above, there had never been an assignment of the mortgage to *them*. The blank mortgage assignments they possessed transferred nothing.

Second, in Massachusetts, a mortgage is a conveyance of land. Nothing is conveyed unless and until it is *validly* conveyed. The various agreements between the securitization entities stating that each had a right to an assignment of the mortgage are *not themselves* an assignment and they are certainly not in recordable form.[47] At best, the agreements gave those entities a right to bring an action to *get* an assignment. But actually *holding* something and having only the *right* to be its holder are two very different things. To obtain a mortgage assignment you do not actually possess presumes, at the least, that you have a demonstrable right to get it, that you will be able to *determine* the entity that validly holds the mortgage you need assigned (not always easy when all previous assignments have not been recorded at the Registry),[48] that that entity will still be *operational*,[49] that it will be able to *find* the relevant paperwork, that it will have someone with authority to *execute* the relevant paperwork, and that it will be able to do so in a *timely fashion*. These presumptions are not always accurate. *See* n. 21, *supra*. As noted above, even the plaintiffs, armed with all their contractual rights, knowledge, and (presumably) access to the relevant files and authorized persons, took *ten months* in *Ibanez*, and *fourteen months* in *Larace*, to get actual mortgage assignments in recordable form. And

---

in which the Property is located," *i.e*., Massachusetts. *Larace* Mortgage at 4, ¶ 15. The assigns that are benefited by the covenants and agreements in the mortgage (*Larace* Mortgage at 4, ¶ 12) are thus limited to the assigns recognized by Massachusetts law (*i.e*., valid assignees of the mortgage). And the power of sale in the mortgage is identified as the *statutory* power of sale (*Larace* Mortgage at 5, ¶ 21), which, as noted above, can only be invoked by "the mortgagee or his executors, administrators, successors or assigns." G.L. c. 183, § 21.

[47] It is also important to note that, at every step in the securitization process, the contractual right to immediate transfer of a mortgage assignment in recordable form was breached. *See* discussion at 12-18, *supra*.

[48] An assignment simply from the last assignee *of record* may not be sufficient. That assignee may have previously assigned the mortgage in an off-record transaction and that off-record assignment may be recorded (even if erroneously) while you are waiting for yours to be processed — a process that the plaintiffs' counsel conceded currently takes anywhere from "two to three months" to "as long as ten to twelve as is observed in some of these cases. And quite frankly, who knows why." Statement of Walter Porr, Jr. at oral argument (Apr. 17, 2009). If so, you would need to pursue an assignment from *that* entity, with associated additional potential problems and delay.

[49] As noted above, Lehman Brothers and its subsidiaries are currently in bankruptcy and Option One has ceased operations.

even *those* assignments may be problematic.[50]

The plaintiffs make much of the fact that they were the holders of the *note* at the time the foreclosure sale was noticed and conducted. But even a valid transfer of the note does not automatically transfer the mortgage. "[T]he holder of the mortgage and the holder of the note may be different persons." *Lamson*, 305 Mass. at 245. The holder of the note may have an equitable right to obtain an assignment of the mortgage by filing an action in equity, but that is all it has. *Barnes v. Boardman*, 149 Mass. 106, 114 (1889). The mortgage itself remains with the mortgagee (or, if properly assigned, its assignee) who is deemed to hold "the legal title in trust for the purchaser of the debt" until the formal assignment of the mortgage to the note holder or, absent such assignment, by order of the court in an action for conveyance of the mortgage. *Id.*; *see also* Eno & Hovey, § 9.49 at 299 and cases cited therein. But, as noted above, the *right* to get something and actually *having* it are two different things. When a bidder goes to a foreclosure sale, he or she is promised and expects to get a conveyance of *the property*. A bidder does *not* expect to purchase the right to a potential lawsuit, which will only entitle him or her to actually obtain the property if such lawsuit is successful.[51] G.L. c. 244, § 14 recognizes this, and limits the right of foreclosure by sale to "the mortgagee or person having his [the mortgagee's] estate in the land mortgaged,"[52] "a person authorized by the power of sale,"[53] and the duly

---

[50] *See* n. 43 & 45, *supra*.

[51] This is why G.L. c. 244, § 14 requires the foreclosing party to be in possession of a valid assignment of the mortgage in recordable form at the time of notice and sale. Without the ability to "go to record" immediately, the title is in doubt and potential bidders cannot help but be chilled. To say that bidders are *absolutely confident* that the foreclosing party will be able to produce the requisite assignment at some point and they are not deterred *in the slightest* by the prospect of delays of up to fourteen months to do so, is to ignore reality. G.L. c. 244, § 14, with its mandate for clarity, permits no such assumptions. *Bottomly*, 13 Mass. App. Ct. at 483-84 (statute requires strict compliance). The legislature has not forgotten that a person's home, his or her equity in that home, and the potential of thousands of dollars in avoidable deficiency debt are at stake.

[52] The original statutory language, making absolutely clear that the phrase "or person having his estate in the land mortgaged" refers to the *mortgagee's* estate in the land, was the following:

> In all cases, in which a power of sale is contained in a mortgage deed of real property, the mortgagee, or any person having his estate therein, or in or by such power authorized to act in the premises, may, upon a breach of the condition thereof, give such notices and do all such acts as are authorized or required by such

authorized attorney, legal guardian, or conservator of such mortgagee or person "acting in the name of such mortgagee or person." G.L. c. 244, § 14. The words "having his estate in the land mortgaged" make clear that the assignment required (exactly as required by "title theory" case law) is a valid conveyance of the mortgagee's interest *in the land* with all the "deed" requirements that that entails.

The Plaintiffs' Foreclosures Did Not Become Valid Because They Purportedly Were "Authorized" By the Actual Mortgage Holders

The plaintiffs' fallback argument — that their foreclosures were valid because they were done at the direction of the actual mortgage holder (Option One) — also fails, for two reasons.

First, the direction did not come from Option One, but rather from another entity (Fidelity) acting for Option One in its capacity as *Loan Servicer*. There is nothing in the record that shows Fidelity's capacity to act for Option One generally (and, more specifically, as *Originator* and holder of the mortgage) and certainly nothing that shows it had any authority to order the disposition of *Option One's* assets. This is no mere technicality. It should never be forgotten that the subjects of these purported directions were interests in land, with all the proofs and safeguards that that necessarily entails. *See, e.g.*, G.L. c. 259, § 1 (statute of frauds).

Second, and most importantly, G.L. c. 244, § 14 requires complete transparency. *See, e.g.*, *Roche*, 106 Mass. at 513 ("These are obscurities that are inconsistent with the degree of clearness that out to exist in such an advertisement."). What is at stake is of utmost importance and finality — the complete extinguishment of a person's rights in his or her property (often the

---

power. . . .

St. 1857, c. 229.

[53] As previously noted, the only person authorized by the *Ibanez* mortgage to invoke the power of sale is the "Lender" (Mortgage at 11, ¶ 22), defined in the mortgage as Rose Mortgage, Inc. in its capacity as mortgagee (Mortgage at 1, Definition (C)). Thus, in full accordance with Massachusetts law (*see* Mortgage at 9, ¶ 16, governing law is "federal law and the law of the jurisdiction in which the Property is located"), the mortgage authorizes only the mortgagee or a valid assignee of the mortgagee to invoke the statutory power of sale. This does *not* include a person or entity which only holds the note. *See* Mortgage at 7, third full paragraph (distinguishing between "Lender" and "any purchaser of the Note").

home where that person and his or her family live) and the transfer of those rights to someone who wants (and is entitled) to complete assurance of good title to that property so that he or she can live there without concern. Thus, when a foreclosure is noticed and conducted for one party by another, the name of the principal *must be disclosed in the notice.* G.L. c. 244, § 14. Here, the plaintiffs were explicitly represented to be the "present holders of the mortgage" and the sale was conducted in reliance on that representation. They cannot now claim to have been something else. As *Bottomly v. Kabachnick*, 13 Mass. App. Ct. 480, 483-484 (1982) and *McGreevey v. Charlestown Five Cents Savings Bank*, 294 Mass. 480, 484 (1936) make clear, G.L. c. 244, § 14 requires strict compliance and a failure to do so means that the foreclosure is invalid.

Conclusion

The issues in this case are not merely problems with paperwork or a matter of dotting i's and crossing t's. Instead, they lie at the heart of the protections given to homeowners and borrowers by the Massachusetts legislature. To accept the plaintiffs' arguments is to allow them to take someone's home without any demonstrable right to do so, based upon the assumption that they ultimately will be able to show that they have that right and the further assumption that potential bidders will be undeterred by the lack of a demonstrable legal foundation for the sale and will nonetheless bid full value in the expectation that that foundation will ultimately be produced, even if it takes a year or more. The law recognizes the troubling nature of these assumptions, the harm caused if those assumptions prove erroneous, and commands otherwise.

For the foregoing reasons, the plaintiffs' motions to vacate the Judgment in these cases are **DENIED**.

SO ORDERED.

By the court (Long, J.)

Attest: _____
Deborah J. Patterson, Recorder

Dated: 14 October 2009